IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 214/01

CASE NO: J2498/08

In the matter between:

NOVO NORDISK	APPLICANT
AND	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	1ST RESPONDENT
JOYCE TOHLANG N.O.	2ND RESPONDENT
THULANI MANQELE	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] In the main application in this matter the applicant seeks to review and set aside the arbitration award issued under case number GA76865 dated 26th January 2001 in terms of which the second respondent found the dismissal of the third respondent (the employee) to have been unfair an ordered his reinstatement.

[2] The applicant has now brought an application for condonation for the late filing of record of the arbitration proceedings. The employee opposed the application

for condonation of the late filing of the record of the arbitration proceedings. In addition to opposing the condonation application the employee has filed an application to have the arbitration award made an order of Court.

[3] The applicant is a company registered in terms of the laws of South Africa and is involved in the pharmaceutical business.

Background facts

[4] This matter has a very long history dating back to January 2001 when the commissioner issued the award ordering the reinstatement of the employee. The applicant was unhappy with the decision of the commissioner and accordingly filed a review application in which it is contended that the commissioner committed an irregularity, misdirected herself and projected a misunderstanding or ignorance of the concept of hearsay evidence.

[5] The offence for which the applicant was charged and dismissed for had to do with theft and unauthorized possession of the applicant's property.

[6] At the arbitration hearing the applicant relied on two witnesses in support of its case that the dismissal of the employee was for a valid and substantively fair reason. The financial director of the applicant, Mr Berndt was the first witness to testify for the applicant. He testified about the information he received from a private investigator regarding certain irregularities which were taking place within applicant's operations. He further testified that he initially did not react to this information but when the private investigator called the third time he decided to arrange a meeting with him. According to him the private investigator

informed him about the applicant's goods which had been purchased in Pretoria and at Bruma Lake. The private investigator also referred during that meeting to photos which were taken at Bruma Lake.

[7] The version of the applicant is that in those photos (which the commissioner had marked "AB1 last page") appear a BMW motor car, and the employee counting money which he had received from the sale of the goods belonging to the applicant.

[8] The chairperson of the disciplinary hearing was Ms Sophos, who was also the second witness of the applicant, testified about the evidence which was led during the disciplinary hearing. She testified that the evidence led during the disciplinary hearing related to the photographs and a box which is alleged to have been used during the sale transaction which the employee undertook at Bruma Lake.

[9] In his defence the employee testified that he was on 25th August 1999, summoned by Mr Berndt to his office and accused of having made R2 million for himself and thereafter showed him certain photographs. He was also accused of having sold the applicant's products in Pretoria and Bruma Lake.

[10] In relation to being at Bruma Lake on the 20th August 1999, the employee testified that he had gone to the area further to the appointment he had with a client who wanted to purchase some products from the applicant. That customer according to the employee wanted to purchase the goods on the basis of a cash sale.

[11] According to the employee on arrival at Bruma Lake, the customer came to him carrying a box which he had assumed was empty because of the manner in which the customer was carrying it. The customer then asked him for the price list which he fetched from his car. On return with the price list the customer showed him insulin. When he enquired as to why the insulin was not in the refrigerator, the customer informed him that it had just arrived. The employee denied having sold the applicant's goods in Pretoria and Bruma Lake.

[12] In finding the dismissal of the employee to be unfair and ordering that he be reinstated the commissioner reasoned that the evidence of Mr Berndt was largely based on the information he received from another source, the private investigator who never testified during the arbitration hearing. It is for that reason that the commissioner found the evidence of Mr Berndt to have been based on hearsay evidence. In arriving at this conclusion the commissioner relied on the provisions of section 3(1) of the Law of Evidence Amendment Act No. 45 of 1988. Section 3(1) of that Act provides as follows:

> *"3(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –*
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> *(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;

(ii) the nature of the proceedings;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section –

"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

[13] The commissioner noted the reasons why the applicant did not call the private investigator to testify. The explanation tendered by the applicant was that the private investigator was scared to testify for fear of his live. In this regard the applicant testified that two of the applicant's partners died in mysterious circumstances. The commissioner rejected this explanation on the basis that there was no evidence that linked the employee to those deaths. It is also apparent that in relation to possible intimidation, the commissioner also took into account the fact that the name of the private investigator was disclosed. It

was for these reasons, it would appear, that the commissioner refused to attach much value to evidence of Mr Berndt and rejected the explanation tendered for the failure to call the private investigator to testify.

[14] The commissioner further found that the process that led to the charging and dismissal of the employee was an entrapment. The commissioner found in regard to the issue of the entrapment that the possibility existed for the private investigator to have gone to great lengths to ensure that the trap was a success because he stood to benefit from showing that the employee was guilty and thereby justify his fees which he was to receive from the applicant.

[15] In relation to the photographs the commissioner found that it was common cause that the person appearing on the photos was the employee. She however found it strange that the photo of the box which is alleged to have come out of the boot of the employee's car was not produced. The commissioner also rejected the version of the applicant that in two of the photos the employee can be seen counting money. She says that she had looked at the two photos and that she can only see the employee bending. She accepted the employee's explanation that the reason he was bending was because he was taking the price list out of the car boot. In this respect the commissioner accepted the version of the employee and found that the applicant did not produce evidence to rebut that version and that there was no proof that the employee was handed money.

[16] The applicant being unhappy with the outcome of the arbitration award, filed a reviewed application which was finalized on 18th November 2004. The mater

came before Revelas J who reviewed and set the arbitration award aside. The Learned Judge found that the applicant was on the facts of the case entitled to dismiss the employee. The employee appealed against the decision of Revelas J. On the 6th March 2007 the Labour Appeal Court struck the review from the appeal roll, set aside the decision of Revelas J and replaced it with the following order:

> *"(a) The application for review brought by the applicant is struck off the roll in order to enable the parties in this matter together with the Commissioner who heard the arbitration to reconstruct those parts of the record of the arbitration proceedings that are missing in the record and supply whatever documents including exhibits before the Commissioner into the review record.*
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> *(b) The applicant is directed to immediately take such steps as may be necessary to initiate the process aimed at achieving the purpose envisaged in (a) above, including bringing to the attention of the Commissioner the fact that the record filed in this review application was incomplete and that her cooperation is required to ensure that there is a complete record before the Court.*
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> *(c) The complete record must have been filed or delivered to the Registrar within (30) Court days from the 6 March 2007, failing which the applicant must in writing through the Registrar apply for*

an extension of the time if the complete record is not filed within that period.

(d) Once the record has been filed with the Registrar or at the time of filing the complete record the applicant must in writing request the Registrar to give the matter some priority in setting it down for hearing in the Labour Court and it is ordered that the Registrar some priority.

(e) The applicant is ordered to pay the costs of the third respondent but such costs shall be limited to disbursements."

[17] It is clear from the terms of the above Court order that the applicant was given 30 (thirty) days from the 6th March 2007 to deliver the record of the arbitration proceedings failing which it had to apply for an extension of that period through the Registrar of this Court.

[18] On the 4th May 2007, the applicant having been late by about 15 (fifteen) days applied to have the period extended. In the mean time the CCMA had set the matter down for reconstruction of the record for the 27th and 28th June 2007. The meeting could not take place because the union on behalf of the employee objected to this arrangement on the basis that they were not consulted about the dates and more importantly that the applicant was out of time and needed to apply for an extension of the period of 30 (thirty) days as stipulated by the Labour Appeal Court order.

[19] The 30 (thirty) days as prescribed by the Labour Appeal Court for the purpose of reconstructing the record was extended further by the Labour Court on 8th November 2007. Following that extension the CCMA scheduled a reconstruction meeting for the 18th and 19th December 2007. Because the parties could not complete the reconstruction of the record on those two days the CCMA scheduled another meeting for the 14th and 15th January 2008. By that time the extension granted would have expired as at 20th December 2007.

[20] The applicant's attorneys addressed a letter to the Registrar on the 8th January 2008, informing her that the parties could not complete the reconstruction at the two days in December 2007 because Mr Berndt walked out of one of the meetings. The applicant further indicated that they would wait for the CCMA to subpoena him back to the process. It is not clear why the CCMA needed to subpoena Mr Berndt to the process when the applicant as his employer could have simply instructed him to do so.

[21] On the 14th January 2008, the CCMA commissioner postponed the reconstruction of the record meeting because of the letter which had been addressed to the Registrar indicating that no extension had been granted.

[22] On the 5th February 2008, Van Niekerk AJ, as he then was, issued a directive through the Registrar indicating that the applicant needed to apply for an extension.

Principles governing condonation

[23] This Court has in several of its judgments stated that the principles governing the requirement for granting or refusal of condonation are well established in our law. In terms of these principles the Court has a discretion which is to be exercised judicially after taking into account all the facts before it. The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or *bona fide* defense in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgement, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc (1997) 18 ILJ 367 (LAC).*

[24] There is also clear authority that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly strong prospects of success may compensate the inadequate explanation and the long delay.

[25] In an application for condonation, good cause is shown by the applicant giving an explanation that shows how and why the default occurred. There is authority that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In

fact the Court could on this ground alone decline to grant an indulgence to the applicant.

[26] The prospects of success or *bona fide* defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (PTY) Ltd v Zulu Electrical and Engineering Wholesalers (PTY) Ltd 1975 (1) SA 612 (D)* and *Chetty v Law Society 1985 (2) SA at 765A-C.*

[27] It is important to point out that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. See *Melane v Santam Insurance Co Ltd, 1962 (4) SA 531 (A) at 532C-F.* It has also been held by the courts that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.

[28] A proper explanation entails, explaining for each period of the delay and the disclosure of all the details relevant to the delay. In explaining why the delay, the applicant need to include the stage at which he or she became aware of the lateness in the referral. If the application was not made immediately or soon after becoming aware of the lateness the applicant need to provide an explanation for that. And more importantly the applicant needs to take the Court into its confidence.

Reasons for the delay

[29] In its application for condonation for the late filing of the record of the proceedings of the Commission for Conciliation, Mediation and Arbitration, the applicant states that it does so in terms of paragraph (c) of item number 2 of the Labour Appeal Court's Order issued under case number JA10/05.

[30] The reason for the delay in convening the first meeting of the reconstruction of the record according to the applicant was due to a difficulty which the parties experienced in securing a date suitable to both parties. The applicant further states that obtaining a suitable time for the commissioner was another factor which also contributed to the delayed in convening of the first meeting.

[31] The applicant contends that the employee contributed to the delay when he addressed a letter to the CCMA objecting to proceeding with the reconstruction meeting which had been scheduled for the 27th and 28th June 2007. The applicant does not dispute that the 30 (thirty) days period had expired and that it had not applied for its extension but contends that the employee was not entitled by virtue of the applicant's lateness to refuse to attend to the reconstruction process. The applicant argues in its founding affidavit that that the provisions of the Court order does not state that an extension of time must be sought from the employee or that the employee or his representative must consent thereto. The applicant further contends that the Court order does not in any manner whatsoever, expressly or by the necessary implication, authorize or allow any of the parties, especially the employee to refuse to participate in the reconstruction

process after the expiry of the period within which the applicant was to have filed the reconstructed record of the arbitration proceedings.

[32] The applicant further contends that the Registrar also delayed in informing it of the outcome of the requested extension and thereby contributing to the late filing of the record.

[33] It is common cause that when the matter was scheduled for the first time the reconstruction process could not be finalized and had to be rescheduled for another date. On that occasion the parties dealt with the reconstruction in so far as it pertains to the evidence of Mr. Jardine. That part of the record was duly completed and certified by the commissioner as reflecting the true version of what transpired during the arbitration proceedings.

[34] On the 18th and 19th December 2007, being the second occasion when the parties met, they could not finalize the reconstruction process due to arguments that erupted in respect of photographs that were tendered as part of the evidence tendered during the arbitration proceedings by the applicant.

[35] The applicant blames the employee for the delay in that according to it the employee was obstructive and uncooperative and as a result thereof Mr. Graham Berndt decided to abandon his participation in the reconstruction of the record process.

[36] As concerning the prospects of success the applicant states that it has good prospects of success in that:

"24.1 That the Third Respondent was not, as per the company policy, authorized to sell products for cash to any of the Applicant's clients, whether existing or potential,-

24.2 That the Third Respondent was not authorized to negotiate cash deals with the Applicant's existing clients or even potential clients-,

24.3 That the Third Respondent was not authorized to conduct business on a Saturday on behalf of the Applicant-,

24.4 That the Third Respondent was not authorized to conduct business in the manner that he did, by meeting with a client in a parking bay-,

24.5 That the insulin under consideration was lethal to the potential patients as same was lined up for incineration."

[37] In his answering affidavit the employee challenges the authority of the deponent to the applicant's founding affidavit, namely Mr Jack Amon Zebediela, who is also the attorney of record of the applicant. The employee contends in this regard that the attorney did not have the authority to attest to the founding affidavit in that there is no resolution authorizing him to attest to the founding affidavit.

Analysis and evaluation

[38] In my view the applicant has failed to show that it deserves the indulgence of the Court in as far as its application for condonation for the late filing of the

reconstructed record of the arbitration proceedings as directed by the Labour Appeal Court is concerned. Instead of explaining why it failed to comply with the 30 (thirty) days period for filing of the reconstructed record in terms of the order of the Labour Appeal Court, all what the applicant does is to place blame on the employee and his representative. It is apparent that at the time the employee representative objected to the dates of the first meeting scheduled by the CCMA the 30 (thirty) days as required by the Court order had already expired. In my view the employee and his representative were correct in insisting that the applicant should seek an extension of the 30 (thirty) days before proceeding with the reconstruction process. I therefore do not agree with the contention of the applicant that the employee and his representative were uncooperative and obstructed the process of reconstructing the record. In a sense in insisting that the applicant should obtain the extension first before proceeding with the reconstruction the employee was refusing to be a party to undermining and engaging in conduct short of contempt of the Labour Appeal Court order. The letter requesting the Registrar to extend the 30 (thirty) days period dated 4th May 2007, by the applicant illustrates in some way the attitude of the applicant particularly in relation to ensuring the speedy finalization of this matter. The letter shows no sense of urgency and the need to avoid having the matter protracted further than it already had. The letter also in my view reflects that the applicant was less concerned about the interests of the applicant which was to have the matter finalized as soon as possible. The relevant parts of the said letter reads as follows:

*"**THULANI MANQUELE/ NOVO NORDISK CASE NO JR214/01***

1. *We refer to the above matter, the hearing which was heard on the 16th of March 2007 and enclosed herewith a copy of court order delivered by the Honourable Justice Zondo Judge President Juppie (sic) and Patel Acting Judges of appeal.*

2. *The parties in this matter have been ordered to reconstruct those parts of the arbitration proceedings that are missing or inaudible in the record and in terms of the court order the Applicant is ordered to apply for an extension if the reconstructed record is not available within 30 days.*

3. *The parties are out of time and we are request that you grant us an extension in the above matter for reconstruction of the record.*

4. *Hope hear from you*

Your faithfully."

[39] The applicant also blames the employee and his representative for the walking out of the meeting in December 2007, by Mr Berndt. According to the applicant Mr Berndt left the meeting because he was not happy with the protracted debates of the employee and his representative. It is apparent that one of the issues that caused the debate concerned the issue of the photographs which were used during the arbitration proceedings. The case of the applicant was during the arbitration proceedings largely based on these very photos which were taken by

the private investigator at scene of the incident at Bruma Lake. The copies of the photos which were used during the arbitration proceedings were marked as annexure by the commissioner.

[40] The photos which the applicant sought to introduce during the reconstruction process were not those which were used during the arbitration proceedings and marked as such by the commissioner. The applicant does not explain what happened to those photos which were apparently collected from the record by its attorneys.

[41] The commissioner in her affidavit states that Mr Berndt was requested to bring the photos which were used during the arbitration proceedings but failed to do so. There is no explanation in the applicant's founding affidavit as to why Mr Berndt failed to comply. It may be important at this point to also indicate that the commissioner in an affidavit confirmed as a true reflection of what transpired at the arbitration proceedings the reconstructed the evidence of Sophos. She further indicates that the reconstruction of Mr Berndt's evidence was not done at the CCMA and that she could therefore not confirm or dispute whether or not the corrections were done by him. It is also important to note that the applicant has not attached a supporting affidavit from Mr Berndt in this regard.

[42] The other difficulty which the applicant has with regard to its application for condonation is that it does not explain why it did not comply with the directive issued by Van Niekerk J. In terms of that directive as indicated earlier the

applicant was required to apply for a further extension of the 30 (thirty) days as provided for in the Labour Appeal's Court order.

[43] The applicant has also failed to deal with another critical aspect in its condonation application, that of addressing the issue of the authority of Mr Zebediela of the attorneys of record to depose to the founding affidavit.

[44] As concerning the prospects of success the applicant relies on the five points quoted above. The legal representative of the applicant argued during the hearing of the condonation application that the Court should take into account the fact that another Judge had already found that the award was reviewable. That does not in my view assist the case of the applicant because that decision was set aside by the Labour Appeal Court.

[45] In my view whilst the standard required in showing prospects of success is lower than that applied when the main case is considered. The applicant for condonation needs show more than just listing factors related to prospects of success. The applicant needs to persuade the Court that there is a chance of the arbitration award being found when the review is considered in the main case to be irregular or unreasonable.

[46] The reading of the arbitration award alone indicates to a very large extent that the commissioner applied her mind to the issues before her and analyzed the evidence of the witnesses that testified. She also took into account in arriving at the conclusion that the dismissal was unfair, the relevant material presented during the proceedings. She evaluated the evidence of the main witness of the

applicant and came to the conclusion that his evidence was based on what he was told by the private investigator. It was for that reason that she concluded that his evidence was hearsay. It may well be that she was incorrect in her evaluation of that version but that is not the test in a review application. The test is that of a reasonable decision maker as set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC).* Assuming that it was possible to consider the review application on the basis of the award and the limited record available, I am of the view that the chances of finding that the conclusion of the commissioner was unreasonable are highly limited. It is also apparent from the reading of the award that the commissioner evaluated the applicant's version which was based on the photos taken at Bruma Lake. She found that whilst the person at the scene as reflected on the photos was the employee and the car at the scene was his, the photos did not constitute sufficient evidence to show that the employee sold the products of the applicant to a third party. In relation to the reason for not calling the private investigator to testify the commissioner rejected the reason advanced by the applicant as to why he did not testify. She dismissed the reason of fear and intimidation as proffered by the applicant. That explanation could not according to the commissioner apply because the name of the private investigator was disclosed.

[47] In my view, the applicant's application for condonation stands to be dismissed.

[48] It is trite that a review application does not automatically stay the enforcement of an arbitration award. However, as a matter of practical approach and

convenience the Court has generally declined to make an award an order of Court whilst there is a pending review application.

[49] In my view the circumstances of this case and justice dictates that this Court should exercise its discretion in favour of upholding the employee's application to have the arbitration award made an order of Court. As a matter of principle the status of the award changes as soon as it is made an order of Court. The consequences of making an award an order of Court is that any pending review would fall away as there would no longer be any award to challenge but an order of Court which can only be challenged by way seeking leave to appeal before appealing against it. I do not believe that an order as to costs should be made in this matter.

[50] In the premises the following order is made:

(i) The applicant's condonation application for the late filing of the purported reconstructed recorded of the arbitration proceedings is dismissed.

(ii) The arbitration award issued by the second respondent under case number GA76865 and dated 26th January 2001 is made an order of the Court.

(iii) There is no order as to costs.

Molahlehi J

Date of Hearing : 28th April 2009

Date of Judgment : 18th September 2009

Appearances

For the Applicant : Adv G Hulley

Instructed by : Tshiqi Zebediela Inc

For the Respondent: Mr S Sebola (Union Official)